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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1360

EDDIE JACKSON, RONALD GARRETT, FAIRH LEE RIGGS, CHARLES RUDOLPH, and CHARLES CAVANAUGH,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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May 23, 1977

(636)

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I.

THIS CASE RAISES IMPORTANT ISSUES CONCERNING 18 U.S.C. § 2518(1)(C)

Contrary to the government's statement (Brief In Opp. at 9), petitioners do not contend that the supporting affidavit of Agent Garibotto "rel[ied] completely on the agent's experience in other narcotics cases." We recognize that the affidavit also included some specific allegations.[1/] Our contention, however, is that these averments proved to be false and misleading, and that the affidavit omitted other critically important information (Pet. at 14-18). The government's wiretap application therefore failed to satisfy the "full and complete statement" requirement of 18 U.S.C. § 2518(1)(c) not because of facial insufficiency alone, but

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1/ We said that the relevant paragraphs of the affidavit "consist primarily of general statements about the agent's prior experience with narcotics conspiracies, and his conclusions regarding the likely course of the investigation." (Pet. at 25) (emphasis added).

because, in light of facts disclosed at trial and unknown to the issuing judge, it was false, misleading and incomplete (Pet. at 27-31). See United States v. Anderson, 542 F.2d 428, 436-437 (7th Cir. 1976) (dissenting opinion).[2/]

United States v. Pacheco, 489 F.2d 554 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975), cited by the court below (Pet. App. 26a) and by the government (Brief In Opp. at 10), is inapposite. For in that case the wiretap was obtained by state officials who were unaware that the informant in question was cooperating with the federal government. Id. at 565. Here it is undisputed that Agent Garibotto, the affiant, was aware of the information withheld from the government's application.

2/ The court of appeals apparently assumed, sub silentio, that the Garibotto affidavit could be impeached under these circumstances (Pet. App. 26a). However, the district court held, as the "more important" reason for denying the suppression motion, that the facts disclosed by the government's informant at trial were insufficient to re-open the findings of the issuing judge (Pet. App. 61a). We believe this issue--whether or not the averments in the supporting affidavit could be impeached--is itself an important question suitable for review by this Court. Cf. North Carolina v. Wrenn, 417 U.S. 973 (1974) (dissenting opinion of Mr. Justice White from denial of certiorari).

United States v. Vento, 553 F.2d 838 (3rd Cir. 1976), also cited by the government (Brief In Opp. at 10), actually supports our position. There the court stated that while it is sufficient for the government to show that other investigatory techniques are impractical and unreasonable to pursue, "[t]he government must . . . fully explain to the authorizing judge the basis for such a conclusion." Id. at 849. Such an explanation (with regard to the unique opportunity that was presented for further infiltration by the government's informant) is precisely what was omitted here (Pet. at 28-30).

The government argues that United States v. Kalustian, 529 F.2d 585 (9th Cir. 1975), is distinguishable from this case because the Garibotto affidavit contained some specific allegations in addition to general statements of the agent's past experience in narcotics cases (Brief In Opp. at 9 n.11). While Kalustian was primarily concerned with facial insufficiency, we note that when the affidavit in this case is striken of its false and misleading averments,

is not significantly different from the affidavit in Kalustian. And the rationale of the Kalustian decision is certainly applicable here.[3/]

II.

IN FAILING TO REQUIRE SUPPRESSION WHERE A WIRETAP ORDER WAS INSUFFICIENT ON ITS FACE, THE COURT BELOW HAS MISCONSTRUED AND RENDERED MEANINGLESS 18 U.S.C. § 2518(10)(a)(ii).

Our argument with regard to the facial insufficiency of the wiretap order (Pet. at 31-38) has been somewhat confused in the government's consolidated opposing brief (Brief In Opp. at 7-8).

3/ While we do believe that § 2518(1)(c) has frequently been interpreted incorrectly (Pet. at 26-27), we disagree with the government's statement that Kalustian is inconsistent with other Ninth Circuit decisions, and that the Ninth Circuit has yet to resolve a proper standard for assessing compliance with § 2518(1)(c). (Brief In Opp. at 9 n.11). For in its most recent decision involving this question, a different Ninth Circuit panel applied Kalustian and again held a wiretap application insufficient. United States v. Spagnuolo, 549 F.2d 705 (9th Cir. 1977). Moreover, Kalustian has not been expressly rejected by any other circuit, and has been cited approvingly in at least one. United States v. Dimuro, 540 F.2d 503, 510-511 (1st Cir. 1976). Also see United States v. Curreri, 388 F.Supp. 607 (D.Md. 1974).

Petitioners' contention, simply stated, is that the order was "insufficient on its face" within the meaning of 18 U.S.C. 2518(10)(a)(ii) because it failed to correctly specify the identity of the authorizing official as required under § 2518(4)(d), and named instead an individual who, as a matter of law, lacked authority under § 2516(1) to approve the application. For the purpose of this argument, it is irrelevant that the application may actually have been approved by the Attorney General.

III.

THIS CASE SHOULD BE REMANDED FOR PROPER DETERMINATION OF PETITIONERS' LIABILITY UNDER THE SUBSTANTIVE COUNTS OF THE INDICTMENT.

Contrary to its position in the court below,[4/] the government apparently now concedes that under Pinkerton v. United States, 328 U.S. 640 (1946), a co-conspirator is liable only for

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4/ See Brief for United States at 73-74 n.47.

substantive offenses committed during the period of his membership in the conspiracy. But the government contends that the findings of the district court "clearly established" that each petitioner was part of the conspiracy before the date of the first substantive offense alleged in the indictment (Brief In Opp. at 12).

However, the district court misstated the law (Pet. at 21), and made no specific findings as to time of joinder or withdrawl from the conspiracy prior to finding each petitioner guilty of all the substantive offenses (Pet. App. 84a-85a).

CONCLUSION

For the foregoing reasons, and those set forth in the petition, a writ of certiorari should

issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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